

1 **BEFORE THE STATE OF WASHINGTON**
2 **ENERGY FACILITY SITE EVALUATION COUNCIL**

3
4 In the Matter of Application No. 2003-01:
5 SAGEBRUSH POWER PARTNERS, LLC;
6 KITTITAS VALLEY WIND POWER
7 PROJECT

**APPLICANT'S RESPONSE TO
KITTITAS COUNTY'S PREHEARING
MOTIONS**

8
9 The Applicant, Sagebrush Power Partners, LLC, by and through its undersigned
10 attorneys, responds to Kittitas County's Prehearing Motions and Argument as follows, and
11 requests that all of Kittitas County's motions be denied. The Applicant notes that the August
12 3, 2004 motions deadline established by Prehearing Order No. 8 was to address motions to
13 strike pre-filed testimony. In addition to legally untenable motions to strike certain
14 testimony, Kittitas County has taken this opportunity to file other untimely motions, which
15 should have been addressed to the Council long ago.
16

17 **I. THE COUNTY HAS PROVIDED NO LEGAL AUTHORITY OR**
18 **RATIONALE FOR A STAY OF PROCEEDINGS**

19 Throughout the County's nine motions, the County requests that testimony be
20 stricken and/or that the Council order an indefinite stay of the pending proceedings. The
21 County has cited no authority for this extraordinary and untimely request. The Applicant has
22 addressed a similar request in response to Steve Lathrop's Motion for Stay. It should be
23 noted that the Applicant has previously requested extensions to EFSEC's timeline to file a
24 request for preemption. These requests were not motions for a stay of proceedings. In fact,
25
26

1 in making these requests for filing deadline extensions, the Applicant requested that no stay
2 of proceedings occur. The Applicant similarly responds and objects to this motion.

3 The Applicant's objection is based upon, but not limited to the following grounds:

- 4 1. There is no authority upon which a stay can be granted. Neither EFSEC's
5 enabling statute (RCW Ch. 80.50), nor its procedural rules (Title 463 WAC)
6 allow for or have any provisions for stays of pending adjudicative proceedings.
7 RCW Ch. 34.05 (Administrative Procedure Act) does not provide for, or allow
8 stays by administrative entities in a proceeding of this kind. For example, RCW
9 34.05.467 authorizes stays of final orders, with disposition of a stay request to be
10 determined "as provided by agency rule." No final order has been issued in these
11 proceedings, and no EFSEC rule has been adopted to provide for stays in any
12 circumstances, particularly on the eve of an adjudicative proceeding. RCW
13 34.05.550 allows for stays after a petition for judicial review has been filed, but
14 only under the very limited circumstances discussed below. Again, this provision
15 is not applicable to these proceedings. While it is possible that an agency could
16 adopt rules to enable a stay of proceedings under very limited circumstances,
17 EFSEC has not chosen to do so.
- 18 2. Even if the EFSEC rules provided a stay remedy, the County has not justified a
19 stay under applicable criteria. The only provision in the Administrative Procedure
20 Act potentially pertinent to stay requests, providing any guidance for issuing a
21 stay, is RCW 34.05.550. However, as stated above, this relates to judicial stays of
22 administrative agency orders. Stays are only allowed if they are necessary "based
23
24
25
26

1 on public health, safety or welfare grounds.” RCW 34.05.550 provides that a
2 court “shall not grant such relief” unless the court finds the following:

3 “(a) The applicant [*i.e.* the party requesting the stay of proceedings] is
4 likely to prevail when the court finally disposes of the matter;

5 (b) Without relief the applicant would suffer irreparable injury;

6 (c) The grant of relief to the applicant will not substantially harm other
7 parties to the proceeding; and

8 (d) The threat to the public health, safety or welfare is not sufficiently
9 serious to justify the agency action in the circumstances.”

10 Even if EFSEC had the authority to grant a stay, the County’s motion does not set
11 forth an adequate basis, nor does the County analyze the requirements necessary for a stay.

12 The basis for the motion must be set forth on its face. Particularly based upon the

13 Applicant’s response below, there are simply no grounds justifying a stay in these

14 proceedings to address the alleged evidentiary issues raised by Kittitas County. The

15 Applicant would suffer irreparable injury by the misapplication of standard evidentiary rules

16 and testimonial procedures in this case, as requested by Kittitas County.
17
18

19 **II. THE COUNTY HAS NOT PROVIDED SUFFICIENT LEGAL**
20 **AUTHORITY OR RATIONALE FOR ANY OF ITS MOTIONS. ALL MOTIONS**
21 **SHOULD BE DENIED**

22 **Response to Kittitas County Motion # 1**

23 **Summary of County’s Motion:** The County alleges that Roger Wagoner’s
24 testimony, which specifically responds to allegations and conclusions made by Clay White
25 and Dave Taylor concerning the County’s Windfarm Overlay Ordinance and the County’s
26 processing of the Applicant’s application, is “not ‘rebuttal’ in nature,” and should be stricken.

1 **Response:** Rebuttal testimony is evidence offered to enable a party to answer new
2 testimony and evidence presented by opposing parties. Rebuttal evidence inherently does not
3 reiterate other evidence, but instead is offered in reply to new testimony and evidence.
4 *McGreevy v. Oregon Mutual Insurance Co.*, 74 Wn. App. 858 (1994). In accordance with
5 RCW 34.05.452, “[e]vidence, including hearsay evidence, is admissible if in the judgment of
6 the presiding officer it is the kind of evidence on which reasonably prudent persons are
7 accustomed to rely in the conduct of their affairs.”

9 Kittitas County disingenuously seeks to silence the Applicant in responding to
10 testimony from Clay White and Dave Taylor which is at times speculative, often constitutes a
11 gratuitous mouthpiece for opponents’ attorneys to offer purely legal conclusions, and makes
12 unfounded allegations about the County’s regulatory process which are at odds with sound,
13 common land use regulatory and planning practice. For example, Mr. White testifies that the
14 Applicant delayed the proceedings and failed to meet the requirements of WAC 463-28-040,
15 by, among other things, failing to submit a *draft* administrative review application with all
16 signatures, and adjoining property notification lists, and by submitting cover letters that were
17 not to the County’s liking. Mr. White opines that this action by the Applicant was
18 fundamentally flawed, and contrary to common practice. Mr. White alleges that the
19 Applicant “decided” “not to meet the EFSEC and GMA goals and policies.” (White at 8.)
20 Mr. White testifies about the County’s unique construct of a “functional equivalent to a
21 FEIS” (White at 27), and contends that the County’s capricious application and review
22 process was clear. Mr. White testifies that the KVVPP will fundamentally change land uses
23 in the project area (White at 32 and 34) and, based upon the non-analogous Mountain Star
24
25
26

1 Resort precedent, contends that that the County's Windfarm Overlay Ordinance establishes
2 "a consolidated hearing process that has been used before and works well" (White at 37.) All
3 of these allegations, and many more not summarized herein, were offered for the first time in
4 the pre-filed direct testimony. The Applicant had never considered these allegations and
5 accusations previously. The Clay White testimony is specious, lacking evidentiary weight,
6 requiring rebuttal.
7

8 Added to this testimony by Clay White, Dave Taylor, testifying for Lathrop, makes
9 sweeping allegations about the purported insufficiency of the KVVPP DEIS, alleges that the
10 Applicant never gave the County "an opportunity to make any form of determination about
11 the application" prior to its withdrawal (D. Taylor at 5), contends that the KVVPP will have
12 "major impacts on the surrounding agricultural activities," (D. Taylor at 5), and, based upon
13 his career as a Kittitas County planner, even appears to offer an "expert" opinion that the
14 EFSEC process violates the Growth Management Act, and that the GMA rendered EFSEC's
15 preemption authority "void." (D. Taylor at 4 - 5.)
16

17 Both the Clay White and the Dave Taylor testimony, and all allegations therein, are
18 new to these proceedings. Left un-rebutted, this testimony grossly misrepresents the factual
19 history of this case, and arrogantly pronounces the pending proceedings incompetent and
20 void. The Wagoner testimony is offered by an expert with substantial qualifications, with a
21 long and esteemed career in Washington's land use planning and regulatory arena,
22 particularly grounded in the GMA and Washington's 1995 Regulatory Reform Act. This
23 testimony is expert testimony that is purely rebuttal in nature, directly responsive to new
24
25
26

1 evidence and testimony, and responsive to the opinions regarding planning and regulatory
2 issues offered by Clay White and Dave Taylor.

3 Kittitas County is welcome to cross-examine Mr. Wagoner. That is the County's
4 remedy. There are no grounds to allow any additional rebuttal testimony by the County,
5 there is no legal justification for striking this testimony, and there is certainly no basis for
6 staying these proceedings. The Applicant anticipates that any differences of opinion
7 regarding this testimony will be duly considered by the Council in exercising its exclusive
8 discretion in weighing the evidence as the trier of fact.

10
11 **Response to Kittitas County Motion # 2**

12 **Summary of County's Motion:** Similar to the motion to strike the Wagoner
13 testimony, the County seeks to silence the Applicant in responding to the speculative,
14 argumentative testimony of Clay White.

15 **Response:** Like the Wagoner testimony, Chris Taylor's rebuttal testimony is directly
16 responsive to testimony offered by Clay White for the first time in these proceedings. The
17 Applicant used the "Question and Answer" format deliberately to request rebuttal to specific
18 accusations and testimony offered by Mr. White. This format imposed significant discipline
19 upon Mr. Taylor's testimony to be completely responsive to Clay White's testimony. Clay
20 White's testimony makes sweeping allegations that Mr. Chris Taylor, as a representative of
21 the Applicant, "always" had a thinly veiled scheme to preempt County decision-making
22 authority. Mr. White levels virtually slanderous charges of incompetence and subterfuge,
23 demanding rebuttal.

1 Based upon the authority and argument set forth in responding to Issue No. 1 above,
2 Chris Taylor's testimony constitutes highly responsive, probative rebuttal testimony. Mr.
3 Hurson may cross-examine Mr. Taylor. There are no grounds to allow any additional rebuttal
4 testimony by the County, there is no legal justification for striking this testimony, and there
5 is certainly no basis for staying these proceedings. The Applicant anticipates that any
6 differences of opinion regarding Chris Taylor's testimony, particularly in comparing its
7 veracity to the Clay White testimony, will be duly considered by the Council in exercising its
8 exclusive discretion in weighing the evidence as the trier of fact.
9

10 Response to Kittitas County Motion # 3

11
12 **Summary of County's Motion:** The County argues that Ted Clausing's prefiled
13 testimony should be stricken, despite its basis in the record and despite its evidentiary value
14 in correcting incorrect testimony of WDFW employee Bevis, whose testimony does not
15 represent the position of WDFW in reviewing the potential wildlife impacts of the Project.
16

17 **Response:** The Applicant objects to and requests dismissal of Kittitas County motion
18 for a stay of the proceedings to allow other parties to prepare rebuttal testimony to "RNP
19 Prefiled Testimony #2 Ted Clausing."

20 Legal counsel for Kittitas County seems to be alleging that the Counsel for the
21 Environment (CFE) has misrepresented the position of WDFW and thus failed to fulfill his
22 duties, insinuating that the CFE has committed legal malpractice when he submitted the
23 testimony of Mr. Bevis.

24 Nowhere in the testimony of Mr. Bevis is there any statement that he represented the
25 agency position in this matter. The position of the agency was clearly made public in its
26

1 comments to the KVVPP DEIS dated January 20, 2004 and March 10, 2004. The testimony
2 and position of Mr. Clausing, representing WDFW, is not a "new" position as asserted by
3 Kittitas County. Both of these previous letters are attached to Mr. Clausing's testimony. The
4 Clausing testimony is valid rebuttal testimony. The proper response by opposing parties is to
5 exercise their right to cross-examine Mr. Clausing.
6

7 The Applicant fails to see any prejudice by the Bevis testimony to anyone, other than
8 the fact that the probative value of this testimony has been soundly refuted. If this testimony
9 had not been filed, no party would have had any testimony to rebut. The WDFW's position
10 regarding wildlife issues for this project is clear, and is part of the record. The time for the
11 other parties to file testimony, as set clearly out in Prehearing Order No. 8, was on July 6,
12 2004. No opponent filed testimony on this subject matter.
13

14 While the Applicant disagrees with the Bevis testimony, the Applicant believes that
15 the CFE has operated in a forthright and competent manner, fulfilling his statutory duties in
16 an exemplary fashion. He has misrepresented nothing, nor has he done anything that could
17 be considered to have misled anyone. The statements made by legal counsel for Kittitas
18 County that CFE failed to fulfill his duties, and the insinuations that he committed
19 malpractice are slanderous and outrageous. However, these statements typify Kittitas County
20 counsel's conduct and representation before this Council. Finally, Ted Clausing is Mr.
21 Bevis' supervisor. There is no "confusion" with regard to the WDFW's position in this case.
22

23 For the reasons stated in above, there are no grounds for ordering a stay of
24 proceedings. This motion should be denied.
25
26

Response to Kittitas County Motion # 4

Summary of County's Motion: The County argues that the Request for Preemption is an "unverified document signed by counsel for Zilkha," and therefore may not be considered "for substantive purposes," and should therefore should be "stricken from the record."

Response: The County's legal counsel provides no legal justification for this blatantly untimely motion. The Request for Preemption was filed on February 9, 2004. It is part of the record of these proceeding and it was served on all parties. There was no need to again photocopy the Request for Preemption and attach it to Chris Taylor's testimony. The County did not file a response to the Request for Preemption. As even the County admits in its motion, in his pre-filed direct testimony, Mr. Chris Taylor sponsors the Request for Preemption, and incorporates it by reference into his testimony. Consequently, all factual allegations in the Request for Preemption, particularly the attached chronology and other documentation, is inherently a part of Chris Taylor's testimony.

The County has long known of all of the factual and legal issues and arguments in the Preemption Request. In fact, it is abundantly clear that Clay White, on behalf of the County, relied upon the Preemption Request and attached documentation, in framing his testimony. Yet, having done so, the County now demands that the Request for Preemption be accorded no substantive weight, and be stricken from the record.

This motion is an untimely request to silence the Applicant. Were the Council to strike the Preemption Request from the record and disallow its sponsorship and incorporation into Chris Taylor's testimony, the Council might as well also strike the entire Application for Site Certification (ASC), in that all material content of the ASC is also sponsored and

1 incorporated into testimony of various witnesses. Regardless of the merits of the County's
2 motion, in accordance with RCW 34.05.452 and WAC 463-30-230, the Council has broad
3 authority to take official or judicial notice of the Request for Preemption and all supporting
4 documents and evidence.

5
6 This motion finds no support in the law, and should be denied.

7
8 **Response to Kittitas County Motion # 5**

9 **Summary of County's Motion:** The County specifically corroborates the
10 Applicant's factual basis for preemption by arguing that the County, not EFSEC, possesses
11 lead agency status under SEPA, RCW Chapter 43.21C, and by demanding that the Council
12 relinquish its legal jurisdiction to the County.

13 **Response:** The County argues that EFSEC certification of this project is not
14 required, and that, therefore, EFSEC is not the lead agency pursuant to WAC 197-11-938(1).
15 This issue was not timely raised. Pursuant to WAC 197-11-924(3) if the County disagreed to
16 EFSEC's determination that it was lead agency, it should have objected within 15 days of
17 receiving notice of the lead agency determination. That determination was made over a year
18 ago, in February 2003. The County's motion is untimely.

19
20 Even if this motion were timely, the County's argument is incorrect. WAC 197-11-
21 938(1) states that EFSEC is the lead agency for proposals that require certification under
22 RCW Chapter 80.50. RCW 80.50.060(2) provides that an applicant may apply to EFSEC for
23 certification of an alternative energy facility. Once such an application is submitted, the
24 requirements of chapter 80.50 RCW apply, including the requirement for certification. The
25 County's argument that the Applicant did not have to apply to EFSEC misses the point. An
26

1 applicant is never required to submit an application for anything. Once an application is
2 submitted to EFSEC, however, "certification is required under chapter 80.50". Thus,
3 pursuant to WAC 197-11-938(1), EFSEC is the lead agency.

4 The County's motion should be denied.

5
6 **Response to Kittitas County Motion # 6**

7 **Summary of County's Motion:** The County redundantly argues that Council
8 member Ifie should be disqualified from participating in these proceedings.

9 **Response:** The Applicant objects to and requests dismissal of Kittitas County motion
10 to disqualify DNR Council member Ifie. This matter has been fully briefed, argued,
11 considered and ruled upon by EFSEC pursuant to Prehearing Council Orders 2, 3, 4, 5, and 6.
12 The last prehearing order on this matter (Prehearing Order No. 6) was entered in January
13 2004. As with the majority of Kittitas County's motions, this motion is untimely and moot.
14 Given that the Council has already ruled on this matter more than once, the Applicant sees no
15 reason to resubmit legal arguments on the substance of this matter.
16

17
18 **Response to Kittitas County Motion # 7**

19 **Summary of County's Motion:** The County argues: (1) that it is unfair to require it
20 to respond to new information contained in the offsite alternatives analysis, to be issued just
21 days prior to the hearing, and (2) demands "release of and [sic] all drafts, preliminary drafts,
22 or any other documents related to the response to comments that are in the possession of
23 EFSEC." No basis is given for the County's document request or for the motion for a stay
24 proceedings until the documents are provided.
25
26

1 **Response:** The Applicant agrees that some adjustment to the hearing schedule
2 should be made to allow responses to the new alternative sites analysis. Consequently, the
3 Applicant is filing a Motion for a Continuance to address this issue. All parties should be
4 entitled to submit evidence with respect to EFSEC's analysis. To allow this, the Applicant
5 suggests that the parties be allowed to submit further prefiled testimony and exhibits *limited*
6 *only to EFSEC's alternative sites analysis*. No new testimony regarding other matters
7 should be allowed or accepted, in that all pre-filed direct and rebuttal testimony on all other
8 matters has been completed, in accordance with Prehearing Order No. 8.

9 The Applicant suggests simultaneous submittal of prefiled testimony and exhibits on
10 September 3, 2004, limited exclusively to the alternative sites analysis. *No new motions*
11 *should be permitted or allowed*. The hearing should be rescheduled accordingly. If EFSEC
12 responds affirmatively to this suggestion, it will be unnecessary to respond to the County's
13 "appearance of fairness" contentions.
14

15 It is difficult to respond to the County's request for release of documents because no
16 grounds are given for the request. This request is not discovery, and if it were, the County
17 has not pursued informal discovery as required by the Prehearing Order No. 8. It does not
18 appear to be a Public Disclosure Act (RCW Chapter 43.17) request. EFSEC is more akin to
19 a "judge" than it is a "party" in this proceeding. This adjudicative hearing is not a venue for
20 an appeal concerning the adequacy of the DEIS. The SEPA Rules expressly state that an
21 administrative appeal of a DEIS is not allowed. WAC 197-11-680(3)(a)(ii). Thus, the
22 documents requested do not relate to any relevant issue pending before the Council in the
23 adjudicative hearing.
24
25
26

1 The Applicant believes that a limited response to the County's request to review the
2 alternative sites analysis prior to the commencement of the adjudicative hearing is
3 appropriate. A continuance to a date certain is appropriate. A stay of proceedings is not
4 appropriate, and is not authorized by any statute or rule. With respect to the demand for
5 public information, it is difficult to respond given that no basis for the motion is given, and it
6 appears to relate to irrelevant subject matter.
7

8 **Response to Kittitas County Motion # 8**

9 **Summary of County's Motion:** Relying upon the cumulative weight of piles of
10 baseless and untimely motions filed by the opponents, including Kittitas County's legal
11 counsel, and relying upon inapposite "authority," the County argues that these proceedings
12 should be stayed to some indefinite time.
13

14 **Response:** The Applicant objects to and requests dismissal of Kittitas County's
15 motion to stay proceedings based upon the "cumulative effect" of all Kittitas County's
16 untimely and groundless motions.
17

18 Kittitas County's motion is self serving and disingenuous. It is unjustified and unfair
19 to suggest that a stay should be granted merely because a party files nine motions at the last
20 minute, and then has the temerity to maintain that a stay of an indefinite duration should be
21 granted because of the number of motions filed. Kittitas County contends the motion should
22 be granted on this basis, even assuming (correctly) that there is no basis for a stay regarding
23 any of its motions. To allow a stay on that basis would allow any party to stall a case
24 indefinitely by filing a multiplicity of legally insufficient motions. This strategy and
25 requested "remedy" would conflict with the clear statutory direction given to EFSEC by the
26

1 legislature in RCW 80.50.010(5) "to ensure that decisions are made timely and without
2 unnecessary delay."

3 The criminal case cited by Kittitas County in its motion is not analogous or relevant.
4 That case applied to a convicted criminal's right to a new trial.
5

6 **Response to Kittitas County Motion # 9**

7 **Summary of County's Motion:** The County accuses EFSEC of misconduct, and
8 appears to allege violations of the Open Public Meetings Act.

9 **Response:** The Applicant objects to and requests dismissal of Kittitas County motion
10 for EFSEC to disclose the date, time, location, attendees and substance of any meetings by or
11 among Council members that took place without notice to the public.
12

13 The Applicant has difficulty understanding the nature or basis for this motion.
14 Counsel for Kittitas County seems to be alleging some type of misconduct by EFSEC, the
15 nature of which is unclear. He also seems to be demanding information from EFSEC. Such
16 a demand for information does not fall within the bounds of proper and allowable discovery
17 in this proceeding. The only thing the Applicant can conclude is that perhaps this motion is a
18 request for information pursuant to the RCW Chapter 42.17 (Public Disclosure Act).
19 However if it is such a request, it has been improperly made.
20

21 Kittitas County's motion should be denied because there simply is not a legal or
22 factual basis upon which the motion can be granted.

23 //

24 //

25 //

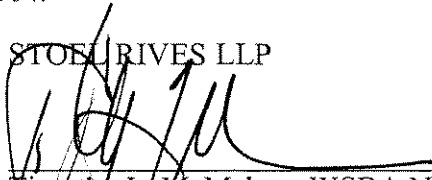
26


III. CONCLUSION

The Applicant respectfully requests that all motions filed by Kittitas County be denied.

Submitted this 6th day of August, 2004.

STOE RIVES LLP


Timothy L. McMahan, WSBA No. 16377
Of Attorneys for Applicant Sagebrush Power
Partners LLC


Darrel Peebles, WSBA No. 885
Of Attorneys for Applicant Sagebrush Power
Partners LLC


Charles W. Lean, WSBA No. 224
Of Attorneys for Applicant Sagebrush Power
Partners LLC

